

UNITED STATES OF AMERICA

Plaintiff,

v.

[5] DAVID OQUENDO-RIVAS,

Defendant.

CRIMINAL NO. 09-427 (JAF)

**UNITED STATES' RESPONSE TO DEFENDANT [5] DAVID OQUENDO-RIVAS'  
REQUEST FOR HEARING TO DETERMINE IF A MOTION TO SUPPRESS THE EYE-  
WITNESS ALLEGED IDENTIFICATION OF DEFENDANT IS WARRANTED**

**TO THE HONORABLE COURT:**

COMES NOW, the United States of America, by and through the undersigned Assistant United States Attorney, and before this Honorable Court very respectfully responds to defendant's request for a hearing to determine if a motion to suppress the eye-witness alleged identification of defendant is warranted and states that no such hearing is required. The FBI 302 reports in which witnesses "C", "D" and "E" identify defendant **[5] DAVID OQUENDO-RIVAS** as having participated in the shootings at La Tombola is self-explanatory and the redactions of personal information and names of witnesses does not support a hearing were witnesses would be subject to pre-trial examination. All of the questions posed by counsel are proper for cross-examination of the witnesses since the defendant has not made a showing that the identification procedure was impermissibly suggestive. See United States v. Montgomery, 150 F. 3d 983, 992 (9<sup>th</sup> Cir. 1998). The defendant's motion is merely being used as a discovery attempt to determine the identity of the witnesses.

**A. Applicable Law**

The Fifth Amendment's due process clause imposes a duty on courts to judge the quality of the identification and the likelihood of misidentification is what violates a defendant's right to due

process. See Neil v. Biggers, 409 U.S. 188, 198 (1972). It is only when the police use an impermissibly suggestive procedure, that the Fifth Amendment would prohibit the admission of such evidence. See Stovall v. Denno, 388 U.S. 293 (1967). In order to prevent the admission of an improper identification, the defendant is required to show that the identification procedure used was impermissibly suggestive. In this case, the defendant has failed to explained why the procedure used was impermissibly suggestive other than arguing the 302s do not have sufficient information because of the redactions made for him to determine is a pre-trial motion is applicable.

#### B. Argument

A simple review of the photo array provided to witnesses “C”, “D” and “E” along with the content of the 302s provides a basis for the identification. The pictures in the photo arrays shown to witnesses “C”, “D” and “E” are very similar looking photos that contain men of the same race, age, and physical appearances. Further, each witness, as detailed in the FBI 302 provided, was able to describe the experience which provided the basis for the identification of defendant, namely their ability to recognize the defendant who was shooting at them. Each of these witnesses had an ample opportunity to view this defendant as described in the FBI 302 and nothing in the un-redacted 302s provides a basis for the defendant to challenge the witnesses identification of the defendant. The un-redacted 302s of witnesses “C”, “D” and “E” were provided this afternoon in docket no. 534 to the Honorable Court for its in-camera inspection.

WHEREFORE, the United States respectfully submits this response to defendant's motion and respectfully requests that Honorable Court deny the motion .

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, this 26th day of September, 2012.

ROSA EMILIA RODRIGUEZ-VELEZ  
United States Attorney

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney of record.

In San Juan, Puerto Rico, this 26th day of September, 2012.

s\Julia Diaz-Rex  
Julia Diaz-Rex - G00308  
Assistant U.S. Attorney